Supreme Court of the United States

October Term, 1945.

No. 187.

CHERRY COTTON MILLS, INC., Petitioner,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER.

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INDEX.

Page

Statement of the Case 1
Opinion Below 2
Jurisdiction 2
Summary Statement of Facts 2
The Statutes Involved 4
Specification of Errors 7
The Questions Presented 7
Points and Summary of Argument 8
The Argument
Point I
The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a debt due the United States which the Comptroller General can recover, nor is it a claim or demand on the part of the Government of the United States of which the Court of Claims has jurisdiction on the counterclaim of the United States 8
(a) The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a debt due the United States, as defined in the Budget and Accounting Act, which the Comptroller General can recover, and, if not a debt due the United States within the meaning of the Budget and Accounting Act, it is not a claim or demand on the part of the Government of the United States within the meaning of Section 145 (2) of the Judicial Code. The acts relate to the same subject matter and are to be construed as in *pari materia* 9

PAGE

(b) The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a claim or demand on the part of the Government of the United States which can be pleaded as a set-off or counterclaim under Section 145 (2) of the Judicial Code 15

Point II

The Court of Claims did not have jurisdiction to enter judgment in favor of the Reconstruction Finance Corporation 28

Conclusion 28

CITATIONS.

Cases:

Astoria Marine Iron Works v. Emergency Fleet Corporation, 258 U. S. 549 ..... 22, 23

Brady v. Roosevelt Steamship Company, 317 U. S. 575 21

Crane, et al., Receivers v. U. S., 73 Ct. Cls. 677 17

Dalton v. United States, 71 Ct. Cls. 421 17

Emergency Fleet Corporation v. Wood, 258 U. S. 549 ..... 22, 23

Federal Housing Administration v. Burr, 309 U. S. 242 ..... 16, 21

Keifer and Keifer v. Reconstruction Finance Corporation, 306 U. S. 381 ..... 20, 21

Inland Waterways Corporation v. Young, 309 U. S. 517 25

Reconstruction Finance Corporation v. Brady, Tex. Civ. App., 150 S. W. 2d 357 24

Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81 ..... 16, 20, 21, 27, 29

PAGE

Sloan Shipyards Corporation v. Emergency Fleet Corporation, 258 U. S. 549...17, 19, 20, 21, 22, 23, 24, 29
U. S. ex rel. Skinner and Eddy Corporation v. McCarl, 275 U. S. 1.....12, 17, 21, 25, 29

Statutes:

Act of March 2, 1799, 1 Stat. 676, Revised Statutes
Section 3466, 31 U. S. C. 191..... 23
Budget and Accounting Act of 1921
Section 2, 53 Stat. 565, 31 U. S. C. 2.....5, 8, 11, 13
Section 301, 42 Stat. 23, 31 U. S. C. 41..... 5
Section 304, 42 Stat. 24, 31 U. S. C. 93.....5, 10
Section 305, 42 Stat. 24, 31 U. S. C. 71.....5, 10
Contract Settlement Act of 1944
Section 3(g), 58 Stat. 650, 41 U. S. C. 103..... 6
Section 13(b)(2), 58 Stat. 658, 41 U. S. C. 113..6, 20
Internal Revenue Code
Section 3770, Revised Statutes, Section 3220, 45 Stat. 996 10
Judicial Code
Section 145(2), 36 Stat. 1137, 38 U. S. C. 250(2).7, 8, 11
Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, 15 U. S. C. 601-3.....6, 8, 27

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No. 187.

CHERRY COTTON MILLS, INC., Petitioner,

v.

THE UNITED STATES.

BRIEF FOR PETITIONER.

Statement of the Case.

This is a suit brought by the petitioner in the Court of Claims to recover $3,104.87 processing and floor-stocks taxes overpaid, which the Comptroller General had certified should be paid to the Reconstruction Finance Corporation. The United States filed its counterclaim, setting up an indebtedness of the petitioner to the Reconstruction Finance Corporation in the amount of $5,963.51 (R. 4). The Court of Claims entered its judgment that the Reconstruction Finance Corporation retain the $3,104.87 and that the United States recover the sum of $2,858.64 on its counterclaim (R. 14, 20).

This Court granted a writ of certiorari October 15, 1945, to review the decision of the court below.

I.

Opinion of the Court Below.

The opinion of the court below was rendered March 5, 1945, and the final order was entered April 2, 1945. The opinion has been reported in 59 F. Supp. 122, 103 Ct. Cls. ...., and is a part of the record on this appeal (R. 9-21).

II.

Jurisdiction.

This Court has heretofore granted a writ of certiorari under the provisions of the Act of February 13, 1925, c. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, 53 Stat. 752, 28 U. S. C. 288(b).

The date of the judgment of the Court of Claims sought to be reversed is April 2, 1945 (R. 20). The petition applying for the writ of certiorari was filed July 2, 1945 and was granted October 15, 1945.

III.

Summary Statement of the Facts.

The case was heard by the Court of Claims on the stipulation of facts entered into by the parties. The court found the facts as agreed to (R. 10 to 14). There follows a summary statement of those facts.

The petitioner was a cotton producer and filed a claim for the refund of processing and floor-stocks taxes paid under the unconstitutional Agricultural Adjustment Act. The claim for refund was allowed by the Commissioner of Internal Revenue in the amount of $3,104.87 and scheduled for credit or refund. A final closing agreement under Section 506 of the Revenue Act of 1936 was accepted and

signed by the Acting Commissioner and the petitioner was advised that, unless it was indebted to the United States Government, a check would issue. The Treasurer of the United States issued a check payable to the petitioner in the amount of $3,104.87, but payment of the check was stopped.

The petitioner had on October 7, 1935, made application to The First National Bank of Florence, Florence, Alabama, for a loan in the amount of $110,000.00 to be evidenced by a note secured by certain collateral, which did not include the claim for refund of taxes. The application was granted and the Reconstruction Finance Corporation agreed to and did purchase a 66 2-3 per centum participation in the note made to the bank and dated January 30, 1936. The note, endorsed in blank by the bank, was delivered to the Corporation and an underlying mortgage was transferred as required by a resolution of the Executive Committee of the Reconstruction Finance Corporation dated October 16, 1935. The $110,000.00 was disbursed by the bank to the petitioner.

The petitioner defaulted in payments on the note, notice of acceleration was served on the petitioner and on July 12, 1939, foreclosure proceedings were instituted in the joint names of the Reconstruction Finance Corporation and the bank and they bid in and became joint purchasers of the collateral. The bid price was $100,000.00. The unpaid balance amounted to $8,945.25, of which $5,963.51 was the share of the Corporation.

The Comptroller General of the United States, in his advice of payment of settlement to accompany the $3,104.87 refund check, certified that a check for the amount should issue in favor of the Reconstruction Finance Corporation in partial liquidation of the $5,963.51 due the

Corporation. The Comptroller General certified the unpaid indebtedness on the note as a debt "due to the United States."

The petitioner sued for the tax refund (R. 1). The United States filed its counterclaim and alleged that the Reconstruction Finance Corporation "is a constituent part of the Government of the United States of America" (R. 4, 8). The Court of Claims, holding that the $5,963.51 debt to the Reconstruction Finance Corporation was "owed to it as agent and trustee for the Government", entered judgment that the Reconstruction Finance Corporation retain the $3,104.87 and entered judgment in favor of the United States for the excess of the $5,963.51, indebtedness of the petitioner to the Corporation resulting from the participation in the petitioner's note, over the $3,104.87 (R. 14, 20).

IV.

The Statutes Involved.

The authority of the Commissioner of Internal Revenue to remit, refund, and pay back taxes, other than income, estate and gift taxes, erroneously or illegally assessed or collected, is to be found in Section 3220 of the Revised Statutes, 45 Stat. 996, re-enacted as Section 3770 of the Internal Revenue Code. The pertinent provision of the section is:

> * * * the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected * * *.

Following the decision of this Court in Butler v. U. S. 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, the Congress sought to prevent the refund of the processing and floor-stocks taxes that, within the wording of Section 3220 of the Re-

vised Statutes, had been erroneously or illegally assessed or collected, and in Section 902 and succeeding sections of the Revenue Act of 1936 imposed conditions on the allowance of refunds. These conditions were met and the provisions of the 1936 Act need not be repeated here. A claim for refund was filed and allowed and suit brought within the requirements of Section 3226 of the Revised Statutes, Section 3772 of the Internal Revenue Code.

The General Accounting Office was created by the Congress in the Budget and Accounting Act of 1921. In Section 301, 42 Stat. 23, 31 U. S. C. 41, the Congress provided:

> There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.

The powers possessed by the General Accounting Office and by the Comptroller General are to be found in Section 305 of the Budget and Accounting Act, 31 U. S. C. 71, which, as of importance here, are:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

and in Section 304, 31 U. S. C. 93:

> The General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States.

In Section 2 of the Budget and Accounting Act, as amended April 3, 1939, 53 Stat. 565, 31 U. S. C. 2, the Congress has for the purpose of the enforcement of the Act defined the departments and establishment of the United States to mean and include:

> * * * any executive department, independent commission, board, bureau, office, agency or other establishment of the Government, including any independent regulatory commission or board and the Municipal Government of the District of Columbia * * .

The Reconstruction Finance Corporation was created by the Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, 15 U. S. C. 601, which, as of importance, is:

> There is hereby created a body corporate with the name 'Reconstruction Finance Corporation' * * *.

Section 2 of the Act, 15 U. S. C. 602, provides that the capital stock of the corporation shall be subscribed by the United States of America and Section 3, 15 U. S. C. 603, provides that the management of the corporation shall be vested in a board of directors consisting of five persons appointed by the President of the United States by and with the advice and consent of the Senate.

In Section 3(g) of the Contract Settlement Act of 1944, 58 Stat. 650, 41 U. S. C. 103, the Reconstruction Finance Corporation is declared to be a contracting agency of the United States. The provision is:

> The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

The provision in Section 13(b)(2) of the Contract Settlement Act, 58 Stat. 658, 41 U. S. C. 113, is that an aggrieved war contractor may:

> bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with sub-

section (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

Under Section 145(2) of the Judicial Code, 36 Stat. 1137, 38 U. S. C. 250(2), the Court of Claims has jurisdiction of:

> * * * All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *.

V.

Specification of Errors.

The court below erred:

1

In entering judgment that the Reconstruction Finance Corporation should retain from the Treasury of the United States the amount of the tax refund due the petitioner.

2

In entering judgment for the United States in an amount equal to the unpaid indebtedness of the petitioner to the Reconstruction Finance Corporation.

VI.

The Questions Presented.

The questions presented are:

1. Is an indebtedness of the petitioner to the Reconstruction Finance Corporation a debt due the United States

which can be set off against an overpayment of processing and floor-stock taxes?

2. Does the Court of Claims have jurisdiction to enter judgment in favor of the Reconstruction Finance Corporation for the amount of the overpayment of the taxes?

The subsidiary or underlying questions are the nature of the Reconstruction Finance Corporation, whether the "body corporate"[1] is a corporation or a "department or establishment"[2] of the Government, and whether a claim by it is a claim "on the part of the Government of the United States"[3] of which the Court of Claims has jurisdiction on the counterclaim of the United States.

VII.

Points and Summary of Argument.

POINT I.

The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a debt due the United States which the Comptroller General can recover, nor is it a claim or demand on the part of the Government of the United States of which the Court of Claims has jurisdiction on the counterclaim of the United States.

The petitioner submits that:

(a) The Comptroller General exceeded his authority under the Budget and Accounting Act. In that act the Government of the United States, for which he may re-

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[1] The Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, 15 U. S. C. 601.

[2] Section 2 of the Budget and Accounting Act as amended April 3, 1939, 53 Stat. 565, 31 U. S. C. 2.

[3] Section 145 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1137, 28 U. S. C. 250.

cover a debt, is defined to include any department, commission, bureau, board, office, agency or other establishment of the Government and, necessarily, to exclude a body corporate such as the Reconstruction Finance Corporation. The Budget and Accounting Act, in its application to the

POINT II.

The Court of Claims did not have jurisdiction to enter judgment in favor of the Reconstruction Finance Corporation.

The Reconstruction Finance Corporation can neither sue nor be sued in the Court of Claims. The Congress has provided and this Court has held that the Corporation may sue as any private corporation in any court, Federal or State, except in the Court of Claims.

VIII.

The Argument.

POINT 1 (a).

The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a debt due the United States, as defined in the Budget and Accounting Act, which the Comptroller General can recover, and, if not a debt due the United States within the meaning of the Budget and Accounting Act, it is not a claim or demand on the part of the Government of the United States within the meaning of Section 145(2) of the Judicial Code. The acts relate to the same subject matter and are to be construed as in pari materia.

The petitioner's claim for the refund of the processing and floor-stocks taxes having been allowed in the amount

of $3,104.87, the Commissioner of Internal Revenue should have proceeded "to remit, refund, and pay back"[1] the amount, unless the petitioner, in turn, was indebted to the United States.

If at the time the petitioner had in fact been indebted to the United States, it would have become the unquestioned duty of the Comptroller General to recover the indebtedness from the petitioner. The Budget and Accounting Act requires that "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office"[2] and that "The General Accounting Office shall superintend the recovery of all debts finally certified to be due to the United States."[3]

Did the Comptroller General, in certifying in his advice of settlement that the check in payment of the refund should issue in favor of the Reconstruction Finance Corporation, act within or exceed his authority? The question must be answered by reference to the provisions of the Budget and Accounting Act. There, in the clearest possible language, we find it provided that:

1. All claims and demands whatever by the Government of the United States shall be settled, adjusted and recovered by the Comptroller General. His is the sole and exclusive administrative authority.

2. A definition of the Government of the United States, as any executive department, independent commission, board, bureau, office, agency or other estab-

[1] Section 3220 of the Revised Statutes, 45 Stat. 996, I. R. C. Sec. 3770.
[2] Section 305 of the Act, 42 Stat. 24, 31 U. S. C. 71.
[3] Section 304 of the Act, 42 Stat. 24, 31 U. S. C. 93.

lishment of the Government, excluding a Government-owned corporation such as the Reconstruction Finance Corporation.[4]

The court below refused to consider or follow the provisions of the General Accounting Act, but stated "We do not regard as material the part which the General Accounting Office played in the transactions here in question."

The set-off against the $3,104.87 was made by the Comptroller General and could have been made by no one else. His act gave rise to the controversy and the suit.

The question presented in the application for the writ of certiorari is whether or not there exists a debt due the United States which may be pleaded as a counterclaim in the Court of Claims under Section 142(2) of the Judicial Code. The subject matter is, however, the same, a claim or demand on the part of the Government of the United States. If the indebtedness of the petitioner to the Reconstruction Finance Corporation is not a debt due the United States, then the Comptroller General had no authority to make his certification and the Court of Claims had no jurisdiction to entertain the counterclaim.

The petitioner submits that, under the clearly expressed provisions of the Budget and Accounting Act, the Comptroller General exceeded his authority. Under that act, a Government-owned corporation is not a department or establishment of the Government of the United States and an indebtedness to such corporation is not an indebtedness to the Government of the United States.

The jurisdiction of the Court of Claims under Section 145(2) of the Judicial Code, 28 U. S. C. 250(2), is of:

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[4] Section 2 of the Act, as amended April 3, 1939, 53 Stat. 565, 31 U. S. C. 2.

> * * * All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *.

The petitioner submits that the jurisdiction conferred on the Court of Claims by Section 145(2) of the Judicial Code is no broader than that given the General Accounting Office of "all debts finally certified to it to be due to the United States." If the Comptroller General had no authority to make the attempted set-off, then the Court of Claims had no jurisdiction to entertain the counterclaim.

Any demand on the part of the United States which may be the subject of a set-of or counterclaim in the Court of Claims must amount to a claim or demand by the Government of the United States and there can be no claim or demand which can be pleaded as a set-off or counterclaim in the Court of Claims over which the General Accounting Office did not in the first instance have authority.

If the claim of the Reconstruction Finance Corporation against the petitioner is not a claim or demand by the Government of the United States against the petitioner within the meaning of the Budget and Accounting Act, it is not a set-off, counterclaim or other demand on the part of the Government of the United States. This principle was recognized by Mr. Justice Brandeis in U. S. *ex rel.* Skinner and Eddy Corporation v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 133, in which he stated, as a basis for the conclusion that the Emergency Fleet Corporation was a Government-owned private corporation:

> At no time, during the War or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the government or been passed upon, as accounts of the United States, either by the Comptroller

> of the Treasury or the Comptroller General. The accounts of the Fleet Corporation * * * have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration.

The Congress has recently provided for the audit of the accounts of Government-owned corporations by the General Accounting Office. The purpose of the act is, as provided, a report to Congress. No authority is conferred on the Comptroller General to settle the claims and demands of Government corporations, nor are they defined or referred to as departments or establishments. An intelligent Congress likened them to ordinary commercial corporations by providing that the audits should be made "in accordance with the principles and procedures applicable to commercial corporate transactions."[5]

In the Budget and Accounting Act, the Congress created an administrative agency to settle, adjust and recover all claims and demands whatever by the United States or against it. In Section 2 of the act, 31 U. S. C. 2, the Congress defined the Government of the United States, its departments and establishments to mean and include:

> * * * any executive department, independent commission, board, bureau, office, agency or other establishment of the Government, including any independent regulatory commission or board and the Municipal Government of the District of Columbia * * *.

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[5] In the Act of February 24, 1945, 12 U. S. C. 1804, the Congress provided:

(a) The financial transactions of all government corporations shall be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. * * *

(b) A report of each such audit for each fiscal year ending on June 30 shall be made by the Comptroller General to the Congress not later than January 15 following the close of the fiscal year for which such audit is made. * * *

The petitioner submits that, if the Reconstruction Finance Corporation, like the Fleet Corporation, is not a department or establishment of the Government of the United States, within the meaning of the Budget and Accounting Act, then its claim against the petitioner is not a claim on the part of the Government of the United States which can be set-off in the Court of Claims. The authority of the Comptroller General to recover a claim or demand due the Government is certainly as broad as that of the Court of Claims. His authority is of "all claims and demands whatever" by the United States, but by the United States as defined in Section 2 of the act.

The point the petitioner seeks to make is that the Reconstruction Finance Corporation is not a department or establishment of the United States within the statutory definition in the Budget and Accounting Act, the provisions of which should be followed here.

The petitioner submits that, in the enactment of the Budget and Accounting Act, the Congress intended that the Comptroller General should have authority to audit all accounts of the United States, its departments and establishments; while in the enactment of the Reconstruction Finance Corporation Act of January 22, 1932, the Congress intended to create a body corporate, separate and distinct from the United States, not subject to the audit of the Comptroller General as a department or establishment. This was done for reasons of expediency or convenience. It was not necessary for the Congress to have created the Reconstruction Finance Corporation as a separate corporate body if the Congress had intended the corporation to be a department or establishment of the United States Government. The Congress could have authorized the Secretary of the Treasury to make loans to national banks

and railroads or could have created an establishment, board or commission to disburse appropriations. The Reconstruction Finance Corporation was created for the purpose of making loans to private industry. The Congress chose to do this through an independent body corporate, separate from the United States.

The Court's attention is invited to the wording of Section 305 of the Budget and Accounting Act, which is that all claims and demands whatever by the Government of the United States or against it shall be settled and adjusted in the General Accounting Office. Congress was there considering all claims and the provision is that absolutely every claim by the Government of the United States or against it shall be settled and adjusted in the General Accounting Office. In not providing in the Reconstruction Finance Corporation Act that the claims and demands of the Corporation shall be settled by the Comptroller General, Congress clearly meant that a debt due the Reconstruction Finance Corporation was not a claim or demand by the Government of the United States. We are here concerned with the Congressional intent and we are in the field of Government finance and the two acts of Congress must be considered together.

POINT 1 (b).

The indebtedness of the petitioner to the Reconstruction Finance Corporation is not a claim or demand on the part of the Government of the United States which can be pleaded as a set-off or counterclaim under Section 145(2) of the Judicial Code.

If the contention of the petitioner that, under the Budget and Accounting Act, a Government-owned corporation is

not a department or establishment of the Government of the United States is not correct and if the provisions of that act are not to be followed, then it becomes necessary to consider the meaning of Section 145(2) of the Judicial Code and to determine what is a set-off, counterclaim, other claim or demand "on the part of the Government of the United States against any claimant against the Government" in the Court of Claims. Is the claim or demand, on the part of the Reconstruction Finance Corporation in the form of a deficiency judgment which it elected to and did establish in its own name and right in the joint suit with the bank in the Alabama state court, a claim or demand on the part of the Government of the United States which the Government of the United States can set up as a counterclaim in the Court of Claims, on either the theory of counsel for the United States that the Reconstruction Finance Corporation is "a constituent part of the Government of the United States" or that of the court below that the Corporation is a "trustee for the Government" or "device for accomplishing the Government's purposes with the Government's money?"

This Court has, in a number of cases, considered the status and nature of the Reconstruction Finance Corporation as well as of other Government-owned corporations, and has consistently held that the Corporation partakes of the nature of a private corporation. The court below has, however, taken the position that the decisions of this Court have been confined to the mere question of the right of a Government-owned corporation to sue and be sued. Judge Madden states at page 17 of the record:

> The Supreme Court in those cases[6] was only deciding what Congress meant when it endowed Govern-

[6] Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595; Federal Housing Administration v. Burr, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724.

ment corporations with the capacity to sue and be sued. It held that Congress intended that they could be sued like private persons, and that sovereign immunity from suit was waived. But no court has decided that Congress shown any intention that the United States must pay out money to one who is indebted to it, through its agent and trustee, in a greater amount on a debt past due.

The court below did not squarely state nor decide the question before it, but mistakenly assumed that the Reconstruction Finance Corporation was acting as the mere agent of the United States. This assumption afforded the court below reason to cite and rely on its previous decision in Crane *et al.*, Receivers v. United States, 73 Ct. Cls. 677, certiorari denied 287 U. S. 601, 53 S. Ct. 7, 77 L. Ed. 523, rather than its decision in Dalton v. United States, 71 Ct. Cls. 421, in which that court held the Emergency Fleet Corporation to have been a private corporation and not a part of the Government of the United States. Among the decisions of this Court cited and followed in the Dalton case are Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. *ex rel.* Skinner and Eddy Corporation v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 133.

The Reconstruction Finance Corporation was not acting as a mere agent, neither on behalf of nor in the name of a principal, but in its own name and right as any private corporation, under the circumstances, would act and as the First National Bank of Florence did act. The Reconstruction Finance Corporation at all times acted as a body corporate, separate and distinct from the Government of the United States. The Reconstruction Finance Corporation and the national bank were joint complainants in the foreclosure proceedings that gave rise to the claims of each. Why should the claim of the Government-owned corpora-

tion differ in any manner from the claim of the Government-created corporation? Both corporations exist under acts of Congress, the one under a special act and the other under a general act.

The sole distinction between the bank and the Reconstruction Finance Corporation is that the United States owns the stock of the Reconstruction Finance Corporation. This Court has held that, in fixing its status or nature, it is immaterial who holds the stock of such a corporation as the Reconstruction Finance Corporation. In the performance of its objects and functions, the Reconstruction Finance Corporation does not differ from a national bank or other corporation created by or under an act of Congress or of a state legislature.

The Reconstruction Finance Corporation is defined in the act of its creation. The Corporation was created by the Reconstruction Finance Corporation Act of January 22, 1932, as:

> There is hereby created a body corporate with the name—Reconstruction Finance Corporation * * *.

The Reconstruction Finance Corporation being a body corporate, which can have but one meaning, an ordinary corporation, its claims and demands are its own and not claims or demands on the part of the Government of the United States.

When the Congress enacted the Reconstruction Finance Corporation Act, it was well aware of the fact that a body corporate is an ordinary corporation, private or municipal. The only difference between the Reconstruction Finance Corporation and any purely private corporation is that its stock is owned by the United States, which, of course, entitles the United States to name the officers and directors.

But this Court has held that it is immaterial who holds the stock or elect the directors and officers of the corporation. That being true, then how does the Reconstruction Finance Corporation differ from a national bank or other corporation created by or under an act of Congress? How does the Corporation differ from the First National Bank of Florence with which it participated in the loan and with which it joined in foreclosure proceedings in their joint names? If it is immaterial that the United States is the stockholder, the decision below is clearly erroneous. The decision below is based on the conclusion there reached that the funds of the Corporation are those of the United States. The only possible basis for such conclusion is that the United States is the holder of the stock of the Corporation. This Court stated the contra in Sloan Shipyards *et al.* v. Emergency Fleet Corporation and related cases, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762, in which Mr. Justice Holmes stated:

> The United States took all the stock but that did not affect the legal position of the company. United States v. Strang, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368.

The petitioner submits that the decision of this Court in Sloan Shipyards is controlling here. The question of importance is, not who owns the stock; but the status, nature, rights and powers of the Reconstruction Finance Corporation as a body corporate separate and apart from the Government of the United States.

While this Court may not have decided the exact question here presented, and as applied to the Reconstruction Finance Corporation, it has held, in cases involving the legal rights and responsibilities of the Corporation, that the Reconstruction Finance Corporation is a corporate agency of the government of the United States, but while it acts as a Governmental agency in performing its func-

tions, its transactions are akin to those of a private enterprise, with the power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal", and that in suing and being sued, the corporation is subject to the ordinary, natural and appropriate incidents of litigation as is a private party in similar circumstances.

The foregoing is from the opinion of Chief Justice Hughes in Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, which the Congress clearly approved and by which it was guided in enacting Section 13(b)(2) of the Contract Settlement Act of 1944. The Chief Justice cited Sloan Shipyards v. United States Fleet Corporation, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; Keifer and Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784. In the Keifer and Keifer case,[7] Mr. Justice Frankfurter, after commenting, or refusing to comment, on the origin of governmental immunity, stated:

> But, because the doctrine gives the government a privileged position, it has been appropriately confined. Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.
>
> Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?
>
> Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends. In spawning these corporations during

[7] The district court held that the Reconstruction Finance Corporation could not be sued in a district court, but in the Court of Claims, since the United States was the real party in interest. 22 F. Supp. 918, aff'd. 97 F. 2d 812, reversed 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784.

> the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to sue-and-be-sued was included.

Of the Keifer and Keifer case, Mr. Justice Douglas stated in Brady v. Roosevelt Steamship Co., 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 495:

> In that case the Fleet Corporation was held to be amenable to suit. And that policy has been followed. For when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored.

In J. G. Menihan Corporation, the Chief Justice, after referring to the Keifer and Keifer case, stated:

> It was with a similar approach that we decided in Federal Housing Administration v. Burr, 309 U. S. 242, 60 S. Ct. 488, 490, 84 L. Ed. 724, that the Federal Housing Administration was subject to be garnished under state (Michigan) law for moneys due to an employee.

The court below distinguished this case from Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, and Federal Housing Administration v. Burr, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724, stating that this Court, in those cases, had before it merely the question of the waiver of Governmental immunity in suits by Government-owned corporations. No other decisions of this Court were cited or referred to in the opinion below. No consideration was given to Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. *ex rel.* Skinner and Eddy Corp. v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 131; Keifer and Keifer v. Reconstruction Finance Cor-

poration, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784, in which the decisions of this Court are in point.

Two other cases were considered with the Sloan Shipyards case, 272 Fed. 132. They are Astoria Marine Iron Works v. Emergency Fleet Corporation, 270 Fed. 386, and Emergency Fleet Corporation v. Wood, 274 Fed. 893.

In Astoria Marine Iron Works v. Emergency Fleet Corporation, the iron works sued the United States Shipping Board Emergency Fleet Corporation for breach of contract and the District Court for the District of Oregon ordered, on demurrer, that the suit be dismissed because the Court held that the suit was for a claim against the United States and in excess of $10,000.00 and further held that it should have been brought in the Court of Claims. District Judge Wolverton, in language quite similar to that of the court below, stated:

> I am impelled to the conclusion that the Fleet Corporation is a governmental entity, created to exercise governmental functions within its restricted limitations, and that for its acts performed in that capacity the United States is not suable, except in the Court of Claims, involving an amount in excess of $10,000. Sloan Shipyards Corp. v. U. S. Shipping Board (D.C.), 268 Fed. 624.
>
> Neither United States v. Strang *et al.*, 254 U. S. . . .; 41 Sup. Ct. 165, 65 L. Ed. . . . ; nor Salas v. United States, 234 Fed. 842, 148 C. C. A. 440, is opposed to this view. The former case must be read in view of Section 41 of the Criminal Code (Comp. St. Section 10205); the court holding that the defendants were not agents of the United States within the true intendment of that section.

This Court reversed the district court and held that the suit was properly brought in the district court rather than in the Court of Claims. In Sloan Shipyards Corporation v. Emergency Fleet Corporation, suit was instituted in a

district court against the Fleet Corporation on a claim in excess of $10,000.00 and the district court held that it should have been brought in the Court of Claims as a claim against the United States, following Astoria Iron Works.

In U. S. Shipping Board Emergency Fleet Corporation v. Wood, the Emergency Fleet Corporation entered into a contract with the Eastern Shore Shipbuilding Corporation for the construction of harbor tugs. The shipbuilding company was declared bankrupt. The Emergency Fleet Corporation filed a claim in the amount of $328,017.72 and claimed priority, which the bankruptcy court disallowed on the ground that the debt represented thereby was not a debt due to the United States. On appeal to the Second Circuit the order of the district court was affirmed.

When these three cases came before this Court, the status and nature of the two claims against a Government-owned corporation and the one claim by it against the bankrupt were squarely presented for determination. The question was, were these claims against or by the Government of the United States? The exact question presented here.

In the Astoria Marine Iron Works and Sloan Shipyards Corporation cases, this Court held that a claim against the Emergency Fleet Corporation was not a claim against the Government of the United States, and in the Wood case, exactly as here, that a claim on behalf of the Emergency Fleet Corporation is not a debt "due to the United States."[8]

A claim of the Reconstruction Finance Corporation against a fund deposited by a state banking commissioner for the benefit of those who had made deposits for savings

[8] Priority under Section 3466 of the Revised Statutes, Act of March 2, 1799, 1 Stat. 676, 31 U. S. C. 191, was denied.

bank equipment, and for those creditors who had filed no claim, was not entitled to priority and preference as a claim on a "debt due the United States", though the Corporation is a federal corporation and an agency of the United States Government. So held in Reconstruction Finance Corporation v. Brady, Tex. Civ. App. 1941, 150 S. W. 2d 357.

The petitioner submits that the questions here presented with respect to the Reconstruction Finance Corporation are the same as those presented in Sloan Shipyards Corporation *et al.* v. Emergency Fleet Corporation and related cases, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762, with respect to the Emergency Fleet Corporation. Mr. Justice Holmes stated the questions presented as:

> These cases present in different ways the question of the standing of the United States Shipping Board Emergency Fleet Corporation in the Courts—the first two, whether it so far embodies the United States that these suits should have been brought in the Court of Claims; the third whether it is entitled to a preference against a bankrupt which it is asserted would belong to the United States if the United States claimed in its own name.

This Court held that the Fleet Corporation was formed like any business corporation with capacity to sue and be sued, as such its contracts were enforcible by ordinary action (not in the Court of Claims) and the Emergency Fleet Corporation stood on the footing of an ordinary creditor in bankruptcy proceedings against a corporation with which it had contracted. In the course of his opinion Mr. Justice Holmes stated:

> The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock but that did not affect the legal position of the com-

pany. United States v. Strang, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368.

In U. S. *ex rel.* Skinner and Eddy Corporation v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 131, the relator had entered into contracts with the Emergency Fleet Corporation. The relator filed its petition in the then Supreme Court of the District of Columbia, seeking a writ of mandamus to compel the Comptroller General to pass on its claims arising out of the contracts. The Comptroller General declined to consider the claims, asserting that he had neither duty nor power to do so and that the duty to pass on the claims rested with the Shipping Board. The Comptroller there took an exactly opposite position from that taken by his successors in this case. In that case the Supreme Court of the District sustained the demurrer and dismissed the petition without opinion. Its judgment was affirmed by the Court of Appeals of the District, 56 App. D. C. 52, 8 F. 2d 1011. This Court granted a writ of certiorari. The Government insisted that the petition was properly dismissed because claims arising out of contracts with the Fleet Corporation were not within the jurisdiction of the Comptroller General. This Court so held. In his opinion, Mr. Justice Brandeis referred to the Food Administration Grain Corporation and other enumerated corporations as "Government-owned private corporations" and stated:

> Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations: * * *.

The Skinner and Eddy and Sloan Shipyards cases involving as they did the same question presented here, should be controlling.

In Inland Waterways Corporation v. Young, 309 U. S. 517, 60 S. Ct. 646, ... L. Ed. ...., the question before this Court, as stated by Mr. Justice Frankfurter, was:

> The question before us is whether a national bank may pledge assets to secure deposits of funds made by governmental agencies, even though they may not be "public money" within the scope of Paragraph 45 of the National Banking Act.

In the course of his opinion, Mr. Justice Frankfurter stated:

> The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. Compare Skinner & Eddy Corp. v. McCarl, 275 U. S. 1, 8, 48 S. Ct. 12, 14, 72 L. Ed. 131. The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328; Emergency Fleet Corp. v. Western Union, 275 U. S. 415, 48 S. Ct. 198, 72 L. Ed. 345. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare United States Grain Corp. v. Phillips, 261 U. S. 106, 113, 43 S. Ct. 283, 285, 67 L. Ed. 552.

The Inland Waterways Corporation case was not cited by the court below, but was relied on by counsel for the respondent and will of course be relied on in their brief here for authority that the funds of the Reconstruction Finance Corporation are in fact the funds of the United States.

The plaintiff submits that the funds of the corporation are its own. The interest of the United States in the Reconstruction Finance Corporation is merely that of a stockholder. The body corporate is the owner of its funds until liquidation.

But is the mere fact that the losses of the Reconstruction Finance Corporation ultimately may be the losses of the

United States decisive here? We are here concerned with the right to sue and be sued and the right to off-set, in the Court of Claims, the claim of the body corporate against a claim against the United States. The one thing that the Congress has most clearly stated is that the body corporate shall have power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal". Section 4 of the Reconstruction Finance Corporation Act. 47 Stat. 6, 15 U. S. C. 604. If the Corporation may sue, the United States may not. The corporation is the proper party. The United States, not having the right to sue, does not have the right to counterclaim.

The Congress having created the Reconstruction Finance Corporation and having clothed it with the exclusive right to sue and be sued, certainly did not mean that the United States could step in and sue or counterclaim on behalf of the Corporation or in its stead. This has recently been considered by the Congress in the Contract Settlement Act of 1944.

While in Section 3 of the Contract Settlement Act, the Corporation is made a contracting agency, in Section 13 of the act, the Congress clearly recognized the distinction between a suit against the United States in the Court of Claims or in a district court for an amount less than $10,000.00 and a suit against the Reconstruction Finance Corporation. The Congress expressly provided "the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law." The Corporation can not be sued in the Court of Claims. Thus has the Congress restated and interpreted the existing law and followed the conclusions of this Court in Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, that, while, the

Corporation is a governmental agency, it is to sue and to be sued as a private corporation.

POINT II.

The Court of Claims did not have jurisdiction to enter judgment in favor of the Reconstruction Finance Corporation.

The Reconstruction Finance Corporation can neither sue nor be sued in the Court of Claims. The Congress has provided and this Court has held that the Corporation may sue as any private corporation in any court, Federal or State, except in the Court of Claims.

The Court of Claims clearly exceeded its jurisdiction in entering judgment in favor of the Corporation in the amount of $3,104.87, which the court in fact did. While the Court of Claims may enter judgment in favor of a party before it, it has no authority to enter judgment for the Reconstruction Finance Corporation which, by act of Congress, may not sue or be a party to a suit in such court.

Conclusion.

The petitioner submits that the amount of the mortgage deficiency set up in the counterclaim is not a debt due the United States or a department or establishment thereof, the recovery of which can be superintended by the Comptroller General and which can be applied as an offset against the indebtedness of the United States to the petitioner. The Reconstruction Finance Corporation is not a department or establishment of the United States Government, but a body corporate, subject to the ordinary incidents of litigation, as was the Emergency Fleet Corpora-

tion under the decisions of this Court in Sloan Shipyards Corporation v. Emergency Fleet Corporation, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; and U. S. *ex rel.* Skinner and Eddy Corporation v. Emergency Fleet Corporation, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 133.

The Corporation is a body corporate, as the act of its creation provides, vested with the rights and liabilities of a private corporation to conduct its affairs and collect debts owed to it in its own name and suit. In order to be a body corporate it must necessarily be an entity separate and distinct from the Government of the United States. The Congress clearly intended so to provide in the Reconstruction Finance Corporation Act and in the Contract Settlement Act of 1944. In the latter act the Congress adopted the principles stated by this Court in Reconstruction Finance Corporation v. J. G. Menihan Corporation, 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, and related cases.

Respectfully submitted,

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